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No. 10-86

In the Supreme Court of the United States

JUDY JOHNSON and JAMES EDWARDS,
Petitioners,

v.

ESTATE OF TERRY GEE, JR., DECEASED, BY SPECIAL ADMINISTRATOR, THOMAS BEEMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

SEAN W. DREW
DREW LAW OFFICE
DONAHUE BUILDING
302 SYCAMORE ST.
P. O. BOX 880
NILES, MICHIGAN 49120
(269) 683-5121
drewlaw@qtm.net

VICTOR S. VALENTI
Counsel of Record
GEOFFREY N. FIEGER
FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX, P.C.
19390 WEST TEN MILE ROAD
SOUTHFIELD, MICHIGAN 48075
(248) 355-5555
v.valenti@fiegerlaw com

Counsel for Respondent

October 18, 2010

Becker Gallagher · Cincinnati, OH · Washington, D C · 800 890 5001

QUESTIONS PRESENTED

1. Did the Seventh Circuit correctly conclude that a jury should decide whether the jail officers were deliberately indifferent to the serious medical needs of a pretrial detainee who required immediate hospitalization where the factfinder could conclude they turned a blind eye to his obvious condition?

2. Did the Seventh Circuit sufficiently and correctly address the "clearly established law" prong of the qualified immunity analysis?

PARTIES TO THE PROCEEDING

Petitioners are Monroe County, Indiana Jail Officers, Captain Judy Johnson and Sergeant James Edwards. Respondent is the Estate of Terry Gee, deceased, by its special administrator, Thomas Beeman.

Defendants-Appellants at the Seventh Circuit Court of Appeals, Bloomington Hospital and Health Care System, Inc., Nurse Practitioner Wygonda Rogers, and Licensed Practical Nurses Jennifer Anderson, Gwen Sunkel and Trina Estes, are not parties to this petition.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). In a nonprecedential disposition, the Court of Appeals for the Seventh Circuit unanimously affirmed the March 31, 1009 Order of the United States District Court for the Southern District of Indiana that denied Petitioners' motion for summary judgment. By Order dated April 15, 2010, the Seventh Circuit panel unanimously denied Petitioners' petition for rehearing. Petitioners filed their writ of certiorari on July 13, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Title 42 of the United States Code § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Factual Background

1. Introduction

This is a 42 U.S.C. § 1983 lawsuit that arose from the March 2005 denial of medical care and deliberate indifference to serious medical needs that resulted in the April 5, 2005 death of Terry Gee, Jr., a pretrial detainee in the Monroe County, Indiana jail. Gee, age 34, was booked into the jail on March 18, 2005 for theft. App. 19. After several days, Gee, a known schizophrenic and severe diabetic, became ill with a sore throat, cough and, as his condition worsened, with a high fever. Gee remained at the jail until March 31, 2005, when he was belatedly transported, in critical condition, to Bloomington Hospital, where he died. App 25-26.

2. March 19-28 – Defendants' prior knowledge of Gee's medical condition

Gee was well known to both the jail custodial staff and to its contract medical staff for his history of severe diabetes and schizophrenia. App. 19. At Gee's March 18 booking, the officer placed him in a detox cell for observation because he knew Gee was a severe diabetic. App. 19. Gee told the booking officer that he was taking a number of prescription medications, including Xanax for anxiety, Seroquel for schizophrenia, and insulin for diabetes. App. 19.

In January 2000, Petitioner Edwards learned of Gee's medical history when he was summoned to Gee's cell for an anxiety attack and breathing issues.

Edwards knew Gee was diabetic and, over the years, he had "a lot of contact with him." In July 2002, Petitioner Johnson transported Gee to the Hospital for insulin at Gee's insistence after he experienced an uncontrolled blood sugar of 602.

When LPN Anderson saw Gee on March 19, at 3:45 a.m., his blood sugar was 325. App. 20. She called Nurse Practitioner Rogers to request insulin. By 8:40 a.m., Gee was complaining of "sweating and hunger," and his blood sugar had crashed to 37. App. 20.

On March 26, Mark Estanislau became Gee's cellmate App. 20. Gee told Estanislau that he was not feeling well and that he did not want Estanislau to catch what he had. App. 20. Gee was refusing food and was in pain and his condition began rapidly declining after the first couple of days. App. 20. Gee was falling out of bed, pacing in circles and complaining of severe back pain. App. 20. Gee told him that he had asked his mother and girlfriend to contact the jail to convince the staff to send him to the hospital. App. 20. Estanislau stated that he and the other inmates repeatedly told jail officers including Johnson and the medical staff that Gee needed to go to the hospital for treatment. App. 21.

Gee's friend Leon Turpin visited him at the jail on March 27, 29, and 30, and noticed the decline in Gee's health. Gee appeared ill on the 27th and by the 30th, "he was barely awake" and was "shaking." As a layperson, Leon Turpin could tell just by looking at him and hearing his weak voice that he needed to go to the hospital. Lloyd Turpin, Leon's brother, saw Gee at court on the 24th and Gee was complaining about his back, holding his side, and looked sick. Lloyd Turpin

also expressed his concerns that Gee needed to go to the hospital to Gee's mother. App. 35-36.

On March 28, Gee and Estanislau called Gee's mother to ask for help for Terry. She called Rogers that day to tell her Terry needed to see a doctor. Rogers told her "We don't have a doctor on call." Dr. Tim Alward, the jail doctor, was unavailable during Gee's last week at the jail because he was out of the country, and he had failed to designate a substitute. App. 18.

3. March 29, 2005 - Gee's condition worsens

At about 4:30 a.m. on March 29, LPN Anderson with Edwards saw Gee in his cell with Estanislau for breakfast tray and medication pass. App. 21. Gee appeared dizzy, he was bouncing from foot to foot, kind of moving in little circles. As Anderson was checking Gee's blood sugar, his knees began to buckle. Anderson and Edwards had to catch him, move him back to the lower bunk, and lay him down. Even then, his legs were constantly moving. His axillary (under armpit) temperature was 103.7, his pulse was racing at 100, his respirations were 30, and his blood glucose was 241. App. 21.

Anderson was concerned about Gee's temperature and his blood sugar instability. Anderson had to help him hold the cup of Kool-Aid she gave him and she gave Gee some Tylenol. She also gave him insulin, but when she checked his blood again at 6:55 a.m., it had spiked up another 86 points to 327. App. 22. Gee was not eating even though Estanislau was encouraging him to eat. App. 20.

4. March 30, 2005 – Johnson places Gee in medical segregation as he continues to decline

When LPN Estes saw Gee at 6 p.m. during the evening medication pass, Gee's blood sugar was 588, a sign of diabetic ketoacidosis. His temperature was 101.8, his skin color was slightly pale, warm to the touch, and he had diminished breathing sounds. App. 23.

When Estes assessed Gee again at around 9:30 p.m. with Johnson present, a further marked decline was noted. Even though she had given him insulin 35 minutes earlier, his blood sugar was 432, and his skin color pale and dusky. App. 23-24. Estanislau told her that Gee had not eaten for two to three days and that he had passed out twice that morning from being so weak. App. 23. Instead of ordering that Gee be evacuated to the hospital, Johnson had him placed in a medical segregation. Gee was so sick that he could not sign the administrative segregation order. App.24. He was taken to the segregation cell by wheelchair because he was too weak to walk. App. 24. Estes wrote on the Pass Through Log that Gee "almost looks green!!" Gee's cellmate Estanislau insisted that he and other inmates were telling Johnson that "he's gotta go, you gotta take him out, he's gotta go to the hospital." Estanislau added:

> The guy needed medical help....Hey let's be blunt. Anybody could tell he needed medical help. It didn't take a rocket scientist. I'm no doctor. I knew he needed medical help.

***

I told Captain Judy that he needed to go to the hospital.

5. March 31, 2005 – Too late to save him, Gee is transported to the hospital

At shift change, Johnson verbally advised Edwards that Gee was in administrative segregation for medical reasons. Edwards looked through the segregation cell window when he came on duty at 12:05 a.m. and observed that Gee was breathing, but he never entered the cell. No medical staff was on duty, and it was not until 4:24 a.m. when LPN Sunkel arrived that anyone actually entered the cell. App. 25. Sunkel had no note about why Gee was in segregation, but she observed he was "very confused" and could not concentrate well enough to pick-up his cup of water and swallow his pills. Even though his color was "ashy" and he was shaking slightly, Sunkel wrote, "Will continue to monitor" and did a status reassessment at 6 a.m. App. 25.

Edwards and Rogers went to Gee's segregation cell at 7:15 a.m. App. 25. At this point, Rogers ordered Gee sent to the ER for evaluation. App. 25. Edwards treated the hospitalization order as routine, locked the cell, and left Gee alone for another 45 minutes until day shift officer Hutchins arrived to transport Gee to the hospital shortly after 8 a.m. App. 26. By the time Hutchins reached the hospital, Gee was unconscious and hospital emergency personnel had to help him get Gee into the Hospital. App. 26.

Gee was admitted in critical condition, for pneumonia with "high fever and confusion...consistent with diabetic ketoacidosis." App. 26. He died on April 5, 2005. App. 26.

B. Course of Proceedings Below

The complaint, as amended, alleged federal and Indiana law claims against the Monroe County Sheriff, Sheriff Steven Sharp, individually, Jail Commander Bill Wilson, Petitioner Captain Judy Johnson, Petitioner Sergeant James Edwards, and Correctional Officers Jason Hochman and Cheryl Gafken. Plaintiff subsequently voluntarily dismissed the claims against Sharp, individually, Hochman and Gafken. The amended complaint also alleged claims against the Medical Defendants Bloomington Hospital and Health Care System, Inc., and its employees, Nurse Practitioner Rogers, and Licensed Practical Nurses Anderson, Sunkel and Estes.

On March 31, 2009, District Judge William T. Lawrence dismissed the municipal liability claims against the Monroe County Sheriff, all of the Indiana state law claims, and the claims against Jail Commander Wilson. App. 44. The medical defendants' motion for summary judgment was denied in its entirety. App. 44. Judge Lawrence denied summary judgment on the § 1983 claims against Petitioners Johnson and Edwards. App. 44. As to Johnson and Edwards, he said that they:

> cannot get over the hurdle that the facts, when taken in the light most favorable to the Estate, suggest that Gee's constitutional right to receive adequate medical treatment was violated. As

> explained more fully below, the Estate has alleged a viable claim of deliberate indifference to medical needs and there are factual disputes that must be resolved by a jury, which precludes the granting of summary judgment. App. 32.

More specifically, the court agreed that:

> [T]here is evidence that, if believed by a jury, suggests that Captain Johnson and Sergeant Edwards were confronted with a case of an inmate who was obviously suffering from an ailment that required immediate treatment. Specifically, various laypersons that included Estanislau, Turpin, and Ms. Gee allegedly recognized that Gee needed immediate medical care beyond what was being administered at the jail and expressed their concern to jail and medical staff. If these persons reached their conclusions based on their observations of Gee, it is at least conceivable that the jail staff should have recognized the potential need for immediate care by the hospital. There is no question that they had the authority to override the nursing staff's recommendations and request that Gee be transferred to the hospital if Gee was facing a serious medical issue. Thus, if the Estate's witnesses are believed, a jury could find that Captain Johnson and Sergeant Edwards turned a blind eye to Gee's condition and improperly deferred to the medical staff. Therefore, the Court concludes that summary judgment cannot be granted in favor of Captain Johnson and Sergeant Edwards. (footnote omitted). App. 35-36.

Johnson and Edwards filed a qualified immunity interlocutory appeal No. 09-1895, as did the medical defendants, No 09-2084. The Seventh Circuit consolidated the appeals. R.5[1]. The Seventh Circuit directed the medical defendants to file a memorandum stating why their appeal should not be dismissed. R.6. The medical defendants filed a jurisdictional memorandum and the Gee Estate filed a response R. 9, R. 11. The Seventh Circuit ordered that the jurisdictional memorandum, response and reply would be distributed along with the briefs in the appeal to the panel assigned to decide the merits of the appeal. R. 17.

Following briefing and oral argument, the Seventh Circuit filed its per curiam, nonprecedential disposition affirming the district court. R. 36, App. 1. The panel recognized that "jail officers were required to complete two 40-hour training sessions, which included a class on medical considerations for inmates." App. 3. The panel also noted that cellmate Estanislau and other inmates "repeatedly told the medical staff and jail officers about Gee's condition and said he needed to go to the hospital." App. 4.

The Seventh Circuit recognized that Johnson and Edwards "fully concede that Gee had a serious medical need" and that "a jury could determine that they [ ] were deliberately indifferent to Gee's medical

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[1] Record references are to the record of the U S Court of Appeals for the Seventh Circuit, No. 09-1895, per Sup Ct. R 12(7).

condition." App. 10-12. The Seventh Circuit held that while prison officials can generally defer to medical professionals' opinions:

> there is an exception when a risk to the prisoner's health is so obvious that a jury may reasonably infer actual knowledge on the part of the defendants. *Vinning-El v. Long*, 482 F.3d 923, 925 (7th Cir. 2007) (citing *Hall v Bennett*, 379 F.3d 462, 464 (7th Cir. 2004)). This may be one of the rare cases where a layperson would recognize that Gee received treatment so inadequate that Johnson's and Edwards' deference to the nurses was unreasonable. *Johnson*, 433 F.3d at 1011. Gee was clearly in terrible shape, and he was deteriorating right before everyone's eyes. We agree with the district court that it is conceivable Johnson and Edwards should have realized that Gee needed immediate medical care, probably in a hospital. App. 12.

Johnson and Edwards petitioned for a panel rehearing. R. 38. The panel denied rehearing. R. 40, App 46.

REASONS FOR DENYING PETITION

The petition strains to create a nonexistent circuit split from the Seventh Circuit's nonprecedential order that affirmed the district court. In fact, there is no conflict, and the caselaw is easily harmonized. The petition also wrongly asserts that the lower courts did not address the clearly established law prong of the qualified immunity test and that a pretrial detainee's constitutional right to medical care for his obvious

serious medical needs was not clearly established in March 2005. Petitioners have not carried their burden of demonstrating any "compelling reasons" for the petition to be granted. Sup. Ct. R. 10.

I. The Seventh Circuit Correctly Concluded That A Jury Should Decide Whether The Jail Officers Were Deliberately Indifferent To The Serious Medical Needs Of A Pretrial Detainee Who Required Immediate Hospitalization Because The Factfinder Could Conclude That The Jail Officers Turned A Blind Eye To His Obvious Condition

The lower courts correctly recognized that while a jail officer is entitled to defer to the judgment of a medical professional with regard to the appropriate way to treat an inmate, a plaintiff can still establish deliberate indifference "by inference from circumstantial evidence, including evidence that the risk was so obvious that a jury might reasonably infer actual knowledge on the part of the defendants." *Vinning-El v. Long*, 482 F.3d 923, 924-25 (7th Cir. 2007). App. 12, App. 35. The lower courts recognized that Johnson and Edwards could not insulate themselves from their constitutional violations by hiding behind the nurses. Their entitlement to rely on medical staff evaporates if the risk is obvious. The constitutional factfinder must decide their § 1983 liability.

A. The Nonprecedential Order Creates No Circuit Split

Petitioners ask this Court to grant certiorari to resolve an illusory split in the circuits that they

manufacture from the Seventh Circuit's nonprecedential order in this case. There is no circuit split and the cited cases are easily harmonized.

The harmonizing rule for the cases discussed by Petitioners was explained in the recent case, *Iko v. Shreve*, 535 F.3d 225, 242-43 (4th Cir. 2008). In *Iko*, corrections officers offered the decedent no medical treatment after they pepper sprayed him and he collapsed. They claimed they deferred to a nurse's apparent decision not to treat him and that his silence in the face of the nurse's questioning amounted to a refusal of treatment. The Fourth Circuit said that while a distant prison officer can generally rely on medical staff's examinations and diagnoses, the on scene officers, face liability for their own decisions made while they were in charge. *Id.* at 242. Putting Iko into a wheelchair upon his collapse without seeking any medical examination or even decontamination was an insufficient response to his serious medical needs.

Most of Petitioners' "conflict" cases involve a "distant" prison official. In *Durmer v. O'Connell*, 991 F.2d 64, 69 (3d Cir. 1993), the two defendants were a warden and a commissioner for corrections who failed to respond to a prisoner's complaints when they knew he was already being treated by the prison doctor. In *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004), the non-medical prison official was its housing unit manager.

In *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990), the complaint alleged supervisory liability against two wardens for the acts of medical staff. See also *Shakka v. Smith*, 71 F.3d 162, 167 (4th Cir. 1995) [warden or chief of security with no knowledge of the kind line

officers would have had]. In *Greeno v. Daley*, 414 (F.3d 645, 655-56 (7th Cir. 2005), the "corrections complaint appeals examiner," who was well-removed from actually observing the inmate and his medical condition, was dismissed. *Berry v. Peterman*, 604 F.3d 435 (7th Cir 2010) involved dismissal of a jail administrator who would not intervene in a complaint about a toothache. *Meloy v. Bachmaier*, 302 F.3d 845, 849 (8th Cir. 2002) involved a claim for failure to provide a CPAP machine for sleep apnea against a director of prisoner medical services who was not personally involved in the medical decision. In *Townsend v. Jefferson Cnty.*, 601 F.3d 1152 (11th Cir. 2010), the jailers were in direct contact with the pregnant inmate who had a miscarriage, but they were dismissed because it was beyond the scope of knowledge of the two lay deputies to assess the situation as being so obviously dire to know that the jail nurse had grossly misjudged her symptoms.

Even in the case of *Johnson v. Doughty*, 433 F.2d 1001, 1010-11 (7th Cir. 2006), where the Seventh Circuit specifically articulated the "unusual case where it would be evident to a layperson" exception that the Seventh Circuit applied in this case, the court affirmed summary judgment to corrections staff where the prisoner was seen by "qualified medical professionals" about his hernia, because his claim bottomed on the fact that he simply disagreed with their decision to treat him without surgery. Here, Johnson and Edwards actually saw Gee's desperate condition, yet they allowed him to languish dying in the jail for more than 72 Hours. When they shuffled Gee off to the segregation cell, they essentially forgot him for eight hours. The lower courts properly denied the qualified immunity-based summary judgment

because a jury could conclude that Johnson and Edwards were deliberately indifferent to Gee's known, serious medical needs.

The Court should deny certiorari.

II. A Pre-Trial Detainee's Constitutional Right To Medical Care For His Obvious Serious Medical Needs Was Clearly Established In March 2005 And The Lower Courts Correctly Held That A Jury Should Determine Whether Johnson And Edwards Were Deliberately Indifferent To Gee's Medical Condition By Not Exercising Their Authority To Have Gee Transported To The Hospital

Both the district court and the Seventh Circuit recognized the applicable test for qualified immunity. App. 7-8; App. 29-30. The fact that they did not specifically address the satisfaction of the clearly established prong is of no legal import.

Qualified immunity shields government officials from liability for civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194, 201(2001), this Court established a two-step inquiry for courts ruling upon the qualified immunity issue. To determine whether an official is entitled to qualified immunity, courts decide: (1) whether the facts alleged or shown by plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendants' alleged misconduct. *Id* at 201. In *Pearson v. Callahan*,

___ U.S. ___, 129 S. Ct. 808, 818, 172 L. Ed.2d 565 (2009), the Supreme Court clarified that the *Saucier* sequence is not an inflexible requirement. Courts are, however, free to follow the *Saucier* procedure where it facilitates the expeditious disposition of the case:

> "Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial." *Id.*

As the district court recognized, under *Saucier, supra*, once the court determines that a constitutional violation could be established on a favorable view of the facts, the inquiry turns to whether the constitutional right was clearly established. App. 29. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . .; but, it is to say that in light of pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) [internal citation omitted].

The denial of medical care to inmates and detainees for a serious medical need is clearly unconstitutional. The Seventh Circuit has long held that a prisoner's serious medical need includes "one that is so obvious that even a lay person would easily recognize the need for a doctor's attention." *Gutieirrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997); see also *Foelker v. Outagamie Cnty.*, 394 F.3d 510, 513 (7th Cir. 2005).

As the circuit court recognized, "the Jail Defendants fully concede that Gee had a serious medical need." App. 10. They also conceded that Petitioners had the ability to send prisoners to the hospital even when the nurses did not order hospitalization. Under *Hope* and *Anderson*, the contours of the constitutional right were sufficiently clear in March 2005 and the lower courts properly tacitly concluded that the clearly established law prong was satisfied.

The district judge correctly found that a pretrial detainee's right to medical care, was clearly established in March 2005. In *Farmer v. Brennan,* 511 U.S. 825, 831 (1994), the Court said that the Fourteenth Amendment requires that a detainee be housed under "humane conditions" and provided with "adequate food, clothing, shelter, and *medical care.*" (Emphasis added). The Seventh Circuit has also made it absolutely clear that deliberate indifference to a serious medical condition is a violation of a clearly established constitutional right. In *Walker v. Benjamin*, 293 F.3d 1030, 1040 (7th Cir. 2002), the court reversed a grant of qualified immunity to a nurse and doctor who refused to give pain medication to a prisoner, saying, "[t]he general standard for liability under the Eighth Amendment for refusal to treat a serious medical condition was well-established at the time of these events [1995]." The *Walker* Court stated that in *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), the Court clarified that the "unnecessary and wanton infliction of pain" is proscribed by the Eighth Amendment, and that deliberate indifference to the serious medical needs of prisoners is "unnecessary and wanton infliction of pain:"

> "'This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.'" (emphasis added).

See also: *Board v. Farnham*, 394 F.3d 469, 485 (7th Cir. 2005) [decided 1/5/05 and holding jailers were on notice that refusing an asthma patient his inhaler when he was complaining of severe breathing problems could constitute deprivation of his constitutional rights]; *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) [deliberate refusal by guard to give pain medication to Hodgkin's disease patient who "couldn't swallow and was spitting blood" was a "gratuitous cruelty"].

The lower court correctly ruled that a jury should determine whether Johnson and Edwards ignored an obviously serious medical condition. The petition should be denied.

CONCLUSION

For these reasons, Respondent asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

Victor S. Valenti
Counsel of Record
Geoffrey N. Fieger
FIEGER, FIEGER, KENNEY,
JOHNSON & GIROUX, P.C.
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555
v.valenti@fiegerlaw.com

Sean W. Drew
DREW LAW OFFICE
Donahue Building
302 Sycamore St.
P. O. Box 880
Niles, Michigan 49120
(269) 683-5121
drewlaw@qtm.net

Counsel for Respondent